

## CALIFORNIA STATE BOARD OF EQUALIZATION

## APPEALS DIVISION BOARD HEARING SUMMARY

In the Matter of the Petition for Redetermination )  
Under the Hazardous Substances Tax Law of: )  
MONARCH CONSULTING, INC. dba ) Account Number EF STF 42-122942  
PES PAYROLL ) Case ID 525103  
Petitioner ) Burbank, Los Angeles County

Type of Business: Employer of Record services

Audit period: 01/01/06 – 12/31/08

<u>Item</u>	<u>Disputed Amount</u>
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Environmental Fee	\$37,382
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	<u>Tax</u>	<u>Penalty</u>
As determined	\$37,382.00	\$3,738.20
Post-D&R adjustment	00.00	- 3,738.20
Proposed redetermination, protested	<u>\$37,382.00</u>	<u>\$ 00.00</u>
Proposed tax redetermination	\$37,382.00	
Interest through 10/31/13	<u>12,408.49</u>	
Total tax and interest	\$49,790.49	
Payments	<u>- 17,888.20</u>	
Balance Due	<u>\$31,902.29</u>	
Monthly interest beginning 11/01/13	<u>\$ 97.47</u>	

## UNRESOLVED ISSUE

**Issue:** Whether petitioner is subject to the annual environmental fee. We conclude that it is.

Petitioner contracts with client companies to provide services as the employer of record for the employees at issue, such as payroll, workers' compensation, labor law compliance, risk management, employee benefits, personnel training, and other staffing services. For all years at issue, petitioner timely filed Environmental Fee returns with the Board, describing itself as an organization employing fewer than 50 employees, and reporting no environmental fee due.

The Standard Industrial Classification (SIC) Code for petitioner is 8748—Business Consulting Services. For all years at issue, SIC Code 8748 was listed on the schedule of organizations that use, generate, store, or conduct activities in this state related to hazardous materials provided by the

1 Department of Toxic Substances Control (DTSC). The Environmental Fees Division<sup>1</sup> of the Property  
2 and Special Taxes Department (Department) concluded petitioner was liable for the environmental fee  
3 imposed in accordance with Health and Safety Code section 25205.6 on organizations employing more  
4 than 1,000 employees, and it issued the Notice of Determination (NOD) in dispute.

5 In response to the NOD, petitioner filed corrected returns reporting fees totaling \$17,888.20 for  
6 the three years. Petitioner explained that it calculated the environmental fees by treating each of its  
7 clients as a separate organization and treating the employees as if they were employed by its respective  
8 clients. Using the numbers of employees it regarded as employed by each client, petitioner computed  
9 its clients' fees and totaled them to establish a fee that would be appropriate on a "consolidated return"  
10 for all of its clients for each year. However, petitioner specified at the appeals conference that the  
11 \$17,888.20 does not represent a concurred amount. Petitioner contends that it employs fewer than 50  
12 persons and that it is not liable for the environmental fee for any of the years in question.

13 Petitioner contends that, through co-employment contracts with its clients, petitioner becomes  
14 the employer of record for tax and insurance purposes, and files paperwork under its own tax  
15 identification numbers, while the client companies continue to direct the day-to-day operations of the  
16 employees. Although petitioner does not dispute that it reported information to EDD for more than  
17 1,000 employees, or that it is the employer of record for these employees, petitioner contends that the  
18 employees hired for petitioner's clients should not count for purposes of establishing the amount of  
19 environmental fee. Specifically, petitioner contends it should not be subject to the environmental fee  
20 because it undertook a form of common management by entering into co-employment contracts with  
21 its clients, thereby meeting the exception set forth in California Code of Regulations, title 22, section  
22 (Regulation) 66269.1, subdivision (a)(1). Petitioner asserts that it is not a professional employer  
23 organization, or in the employee leasing business, and that it is not the employer of the employees  
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27 <sup>1</sup> On December 10, 2012, the Property and Special Taxes Department (PSTD) was reorganized. After that reorganization,  
28 the Special Taxes Audit and Carrier Division is now responsible for issuing Notices of Determination for PSTD. However,  
this determination was issued in 2010 by the Environmental Fees Division.

1 hired for its clients because it has no control or supervision over the employees' hours, wages, or  
2 hiring and firing.<sup>2</sup>

3 It is undisputed that petitioner's SIC code is identified on the list provided by DTSC as an  
4 organization that uses, generates, stores, or conducts activities in this state related to hazardous  
5 materials. Therefore, we find petitioner is a type of organization subject to the fee. It is also  
6 undisputed that petitioner was the employer of record for more than 1,000 employees who worked  
7 more than 500 hours per year, and that petitioner reported these employees as its own employees to the  
8 Employment Development Department (EDD). Petitioner's argument that it is not the employer  
9 within the meaning of Unemployment Insurance Code section 606.5, subdivision (c), is belied by the  
10 fact that petitioner is registered as the employer for purposes of the California Unemployment  
11 Insurance Code, that petitioner pays the unemployment taxes and handles all phases of claim  
12 management, and that petitioner is registered as the employer with EDD.<sup>3</sup> Because claimant is the  
13 employer that reports the employees to EDD (see Cal. Unemp. Ins. Code § 13020), claimant is  
14 responsible for the environmental fee, pursuant to Regulation 66269.1, unless claimant can show that it  
15 meets the exception of common ownership or management.

16 We are not persuaded by petitioner's assertion that the facts fall within the common  
17 management exception to the environmental fee assessment. Petitioner states that by entering into "co-  
18 employment contracts" with its clients, petitioner undertakes a form of common management with  
19 regard to the employees. Claimant's contention misconstrues the concept of common management.  
20 Regulation 66269.1 is clear that the exception applies to two or more businesses that are united by  
21 common ownership or management, that is, when the *businesses* are owned or managed by the same  
22 people. Such is not the case here. Therefore, we find the provision inapplicable.

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<sup>2</sup> As a policy argument, petitioner also contends that the assessment of the fee on petitioner is unconstitutionally arbitrary  
26 and discriminatory and contravenes the legislative intent of the statute. However, public policy contentions are not relevant  
27 because there is no authority for an administrative agency to refuse to enforce a statute on the basis that it is  
unconstitutional. (Cal. Const. art. III, § 3.5, subs. (a), (c).) Thus, the public policy argument will not be addressed further.

28 <sup>3</sup> A Board publication and an annotation cited by petitioner each relate to the calculation of the number of hours worked by  
an individual employee and thus are not relevant to the issue of whether an organization is the employer.

**RESOLVED ISSUE**

The Department imposed a negligence penalty because the amount of unreported environmental fee was substantial. However, subsequent to the appeals conference, the Department reconsidered that position and concluded that the understatement was not the result of negligence. We concur, and we recommend that the negligence penalty be deleted.

**OTHER MATTERS**

None.

Summary prepared by Deborah A. Cumins, Business Taxes Specialist III